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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LEONARD S., Petitioner, v. THE SUPERIOR COURT OF MARIN COUNTY, Respondent MARIN COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Real Party in Interest.	A107389 (Marin County Super. Ct. No. JV 22802)

Leonard S. (Father) challenges an order of the Marin County Superior Court, Juvenile Division, which set a hearing under Welfare & Institutions Code section 366.26[1] in the dependency proceeding of Christopher S., one of his three children. We deny his petition on the merits.[2]

[1] All further statutory references are to the Welfare and Institutions Code. References to rules are to the California Rules of Court.

[2] Section 366.26, subdivision (*l*)(1)(A) bars review on appeal if the aggrieved party has not made a timely writ challenge to an order setting a hearing for selection and implementation of a permanent plan. The statute also encourages the appellate court to determine all such writ petitions on their merits, as we do here. (§ 366.26, subd. (*l*)(4)(B).)

BACKGROUND

Security workers at the San Francisco Shopping Mall summoned city police officers on August 20, 2003, reporting they had observed Mary N. (Mother) "staggering" and "out of it" as she attempted to push a baby stroller. They also reported seeing Mother holding her infant child, Christopher (born October 2002), "by the legs, upside down" over a marble floor. The police arrested Mother for public intoxication and child endangerment and took Christopher into temporary custody. (See § 305.) After an unsuccessful attempt to take Christopher into her care, an unidentified female left the scene with a group of children. The Marin County Department of Health and Human Services (Department) later learned that Christopher's two siblings, Monique L. (born October 1989) and Johnny S. (born April 1995), had been among this group of children and had witnessed Mother's behavior and arrest.

The Department, on August 22, 2003, filed a petition under section 300, subdivision (b), as to Monique, Johnny, and Christopher. The petition alleged the children were at risk of serious harm when left in the care of Mother, because the latter's "substance abuse issue" left her periodically incapable of providing regular and appropriate care. It also alleged Father had failed to protect the children because he "continuously and repeatedly allowed the children to be in [their mother's] care . . . despite knowledge of her continued substance abuse and severe neglect." The juvenile court detained Christopher in out-of-home foster care. Monique and Johnny remained with Father, who apparently had obtained their full custody in a prior dependency proceeding.

At the combined jurisdictional and dispositional hearing, held October 21, 2003, the juvenile court formally established dependency jurisdiction over the children and continued Christopher in foster care. The court order entered that date also directed the parties to adopt the Department's reunification plan with regard to Christopher and its family maintenance plan with regard to Monique and Johnny. In addition, it provided Christopher "may be released to [Mother's] custody by way of declaration and order."

Subsequently Mother entered a residential drug abuse treatment program, which on January 5, 2004, informed the Department that she was ready to have Christopher placed with her "while in treatment." The Department made this placement on January 8, 2004, and, on January 13, 2004, obtained the court's approval by application for ex parte order and declaration. Later that month, however, Mother left the residential program on several occasions without permission. As a consequence, the program, on January 30, 2004, informed the Department that it was willing to accept Mother if she returned, but requested the Department remove Christopher for his own safety. The Department did so and returned Christopher to foster care. On February 3, 2004, it filed a petition under section 387,[3] which alleged the foregoing circumstances and sought an order to remove Christopher formally from his placement in Mother's physical custody and to return him to out-of-home care.

The juvenile court conducted its "jurisdictional" hearing on the section 387 petition on February 24, 2004, and after several continuances held the "dispositional" hearing on July 23, 2004.[4] On the latter date, the court simultaneously held Christopher's six-month status review, which had also been continued.[5] (See §§ 366, subd. (a)(1), 366.21, subd. (e).) At the conclusion of the combined hearing, on July 23, 2004, the court ordered that Christopher be placed in foster care, that both parents' reunification

[3] Under section 387, the juvenile court may issue an "order changing or modifying a previous order by removing a child from the physical custody of a parent . . . and directing placement in a foster home" upon a "supplemental petition . . . filed by the social worker in the original matter" that shows "the previous disposition has not been effective in the . . . protection of the child . . . ." (§ 387, subd. (a).)

[4] A section 387 petition has no effect on the court's preexisting jurisdiction. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077.) The "jurisdictional" and "dispositional" phases in adjudicating such a petition are so called because the court initially follows procedures applicable to jurisdictional hearings in deciding whether the petition's allegations are true, and, if so, it follows the procedures applicable to dispositional hearings in deciding the child's new placement. (*In re Jonique W.* (1994) 26 Cal.App.4th 685, 691–692; see rule 1431(d).)

[5] Previously, on July 21, 2004, the court had conducted its six-month status review of Monique's and Johnny's in-home placement with Father. (See § 364, subd. (a).) As to this placement, the court ordered continued supervision and family maintenance services.

services be terminated, and that the matter be set for hearing to select a permanent plan for Christopher pursuant to section 366.26. Father now seeks review of this order by extraordinary writ. (§ 366.26, subd. (*l*)(1).)

DISCUSSION

A. Finding Regarding Substantial Risk of Detriment

The order of July 23, 2004, included a finding that there was "clear and convincing evidence that the return of Christopher to either of these two parents would create a substantial risk of detriment to his physical or emotional wellbeing." Father suggests this finding is erroneous. Specifically, he argues that, in connection with the "dispositional" hearing on the section 387 petition, the "Department did not prove by clear and convincing evidence that the return of Christopher [to Father] . . . would create a substantial risk of detriment to [Christopher]."

We question initially whether the court was required to make this finding "by clear and convincing evidence," at least when it considered whether to return Christopher to *Father's* custody. Father has offered no authority or explanation why this standard should apply. Real parties in interest, however, evidently concede the point, and we therefore have no occasion to decide it. Accordingly we review the record to determine whether substantial evidence would support a reasonable trier of fact in making the same finding based on the clear and convincing evidence standard. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694.)

Father's argument summarizes the evidence most favorable to his position. It is axiomatic, however, that we do not focus on such evidence, but review the record in the light most favorable to the trial court's order. (*In re Isayah C., supra,* 118 Cal.App.4th at p. 694.) Department reports admitted without objection at the combined hearing include the following. Early in the proceeding Father admitted to a Department social worker that Mother's "substance abuse issues have always been a problem." He "acknowledged . . . his children are not safe in [her] care . . . due to her substance abuse and alcohol problems." A counselor assigned to Mother expressed "serious concerns about [Mother's] commitment to recovery, due to [Father, who] allow[ed] [Mother] not to

seriously address her alcohol addiction." Between the time Mother left the residential treatment program in late January 2004, and the date of the combined hearing in late July 2004, Father "consistently allowed [Mother] to return to [and live in] his residence," although she continued to abuse alcohol, continued to minimize the seriousness of her problem, and continued to make no sustained effort to seek treatment or address her problem.[6] Father allowed Mother to remain in his home during this time even though he "[knew] that at times she [was] drinking alcohol in front of the children." Father testified that it would "be hard on [him]" if he made her leave the home, because he "need[ed] help" caring for the children while he was at work.

The social worker, on the other hand, both reported and testified that Mother's presence in the home during this period "appear[ed] to . . . negatively impact[] Monique and Johnny." It also precluded any serious consideration of returning Christopher to Father's custody. Father thus failed to "protect the children from the abuser" and from emotional harm, as required by his case plan.

Father additionally failed either to assist Mother in her addiction recovery efforts or to follow through on Department referrals to meet with counselors and attend meetings so as to become "better educate[d] . . . regarding [Mother's] addiction issues." Father's actions during this period were consistent with an extensive past history recorded by several county social service agencies, in which he failed to protect his children by leaving them with Mother while she abused heroin or alcohol. He continued leaving the children with Mother even though he had been given sole custody of Monique and Johnny in 1999, after Mother failed to reunify with them.

As for Mother, the incident at the San Francisco Shopping Mall, which precipitated the present proceeding, was not the first time she had endangered the

[6] It appears Mother made no voluntary effort to seek treatment between the time she left the residential program in late January 2004 and June 24, 2004. After being arrested then hospitalized, on June 9 and 10, respectively, Mother was placed in a residential dual-diagnosis program on June 24, 2004. The social worker testified, however, that Mother left this program without permission, and was again arrested, several days before the combined hearing on July 23, 2004.

children when Father left them in her care. She was arrested, for example, in February 1997, after police found her to be intoxicated in public "while [Johnny] ran in and out of traffic." She was then subject to an order that did not "allow[] [her] to have her children in her care," and had been arrested for endangering Monique under similar circumstances as early as May 1990. The social worker expressed the opinion that Father's "co dependent [*sic*] and ineffective behaviors have allowed this family to suffer for as long as they have," and that Monique and Johnny remained "at risk of being removed from his custody" "as long as [he] remains in denial" about, and "minimize[s]" Mother's "addiction and its impact on the children."

Finally, the Department distinguished its determination regarding the risk of detriment to Christopher if he was returned to Father's custody and its determination to leave Monique and Johnny in Father's custody. Specifically, the latter were enrolled in local schools that could provide oversight regarding their needs. They had greater self-sufficiency because they were older, and had expressed a desire to stay with Father. Christopher, on the other hand, was much younger and "at a critical stage of development" requiring "stable, consistent caregiving."

We conclude the foregoing evidence alone constitutes substantial evidence from which a reasonable trier of fact could find, under the clear and convincing evidence standard, that returning Christopher to Father's custody would create a substantial risk of detriment to Christopher's safety, protection, and physical or emotional well-being. (*In re Isayah C., supra,* 118 Cal.App.4th at p. 694.) This evidence of Father's past and current history, taken together, showed a "high probability" of such risk, so as to leave no substantial doubt. (*Id.* at pp. 694–695.)[7]

[7] Given the wording of Father's argument, that the "Department did not prove by clear and convincing evidence that the return of Christopher [to Father] would create a substantial risk of detriment to [Christopher]" we have assumed this contention implicated the similarly worded finding quoted above. We note, however, that the court made a similar finding "by clear and convincing evidence, pursuant to . . . section 361 that there [was] a substantial danger to [Christopher's] physical health . . . or would be if [he] was returned home, and there is no reasonable means by which [his] physical health can be protected without removing [him] from the physical custody of [Father] and

B. Finding Regarding Progress With Reunification Plan

At a six-month status review hearing, the court may schedule a hearing under section 366.26, "[i]f the child was under the age of three years on the date of the initial removal . . . and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan." (§ 366.21, subd. (e).) In such event the court must also terminate reunification services to the parent. (§ 366.21, subd. (h).) In this case, the juvenile court's order of July 23, 2004, included a finding that "the parents have not made substantial progress in complying with the case plan or in alleviating or mitigating the causes . . . necessitating placement of [Christopher] in out of home care." The court therefore terminated reunification services.

Father suggests this finding is erroneous as to him. He argues the court "was obliged to order another period of reunification services because [he] participated regularly in the court-ordered case plan and made substantive progress."

He first contends the court should not have considered evidence regarding his efforts to comply with his case plan, because he was never advised, as required by statute, "that [his] failure to cooperate, except for good cause, in the provision of services specified in [his] case plan [might] be used in any hearing held pursuant to Section 366.21 . . . as evidence." (§ 16501.1, subd. (f)(11)(B).) Since Father fails to

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[Mother]." It appears this second finding relates to the Department's request, in its section 387 petition, that Christopher be formally removed from Mother's physical custody and returned to foster care. That is, the removal of a child from a custodial parent pursuant to a section 387 petition is subject to the same requirements as a child's initial removal from a custodial parent under a section 300 petition (*Kimberly R. v. Superior Court, supra*, 96 Cal.App.4th at p. 1077), and initial removal may, among other things, be based on clear and convincing evidence that there is, or will be, "substantial danger to the [child's] physical health" if he or she is not removed. (§ 361, subd. (c)(1).) This finding was strictly unnecessary as to Father, because Christopher had been already been removed from both parents on October 21, 2003, and had been returned to Mother's, but not Father's, custody by the order of January 13, 2004. In any event, we conclude the evidence summarized above is also sufficient to support this finding.

show he ever objected to the admission of evidence on this ground, this claim has no merit. (See Evid. Code, § 353.)

Father next refers to specific case plan requirements, the chief of which was that he "not allow any contact between the abuser and [the] child(ren)." At the hearing, the social worker testified he had not complied with this requirement because he continued to allow Mother into the house. Father suggests it was improper for the Department to claim he failed to comply with this requirement as to Christopher, when it "deemed [his compliance] sufficient . . . to allow the two older children to remain in his custody." He also argues the Department never made it clear to him that compliance with this requirement meant he could not allow Mother to live in his house.

As to these objections, we note, first, the Department did not concede Father was in compliance with this requirement as to Monique and Johnny. To the contrary, it reported that Father "continue[d] to allow [Mother to have] unsupervised contact with both Johnny and Monique." It merely made the distinction that this noncompliance supported a determination of "substantial risk of detriment" if Christopher were to be returned to Father's custody (§ 366.21, subd. (e)), whereas it supported a determination that "continued supervision [was] necessary" as to Monique and Johnny. (§ 364, subd. (c).)[8] In addition, the Department did make it clear in the court-ordered reunification plan that compliance with this particular requirement called for Father to demonstrate that he could "protect his children from their mother's serious substance abuse and alcohol use." As noted above, there was substantial evidence that Father failed to satisfy this objective in that he consistently allowed Mother to remain in the home after January 2004, knowing both that she was continuing to use alcohol, at times in front of Monique and Johnny, and was not participating in or seeking treatment for this problem.[9]

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[8] See footnote 5 *ante*.

[9] Father also mentions that he presented good cause for failure to follow through with individual and family counseling requirements, and that he complied with requirements concerning parenting classes and visitation. It is unnecessary to address these assertions. For purposes of upholding the challenged finding, it is sufficient to note

Father's last criticism is that in March 2004, the Department initially recommended further reunification services, in a report prepared for the "dispositional" hearing on its section 387 petition. After the matter was continued, however, the Department, by May 2004, had filed subsequent reports that "sandbagged" Father by recommending termination of reunification services.

The purpose of this particular objection, in relation to Father's compliance with his reunification plan, is unclear. If Father suggests that the court, in finding he had failed to make substantial progress with his plan, should not have considered evidence submitted after the first continuance on March 23, 2004, it is enough to note that he offers no authority to support this proposition and that he either agreed or failed to object to any of the continuances entered on and after March 23, 2004.

Ultimately, none of Father's arguments touch upon the real question, that is, whether the record, viewed in the light most favorable to the court's ruling, discloses substantial evidence on which a reasonable trier of fact could have made the challenged finding based on the clear and convincing evidence standard. (*In re Isayah C., supra,* 118 Cal.App.4th at p. 694; see § 366.21, subd. (e).) Referring to the evidence previously summarized, with respect to the finding concerning the "risk of detriment" if Christopher were to be returned to Father's custody, we conclude a reasonable trier of fact could find—without any substantial doubt—that Father failed consistently to "protect his children from their mother's serious substance abuse and alcohol use." His "dismal performance [on the one] most crucial aspect of [his] reunification plan" was enough to support a finding that he had failed to "make substantive progress in [his] court-ordered treatment plan" for purposes of section § 366.21, subdivision (e). (See *Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 398.)

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the social worker's testimony that Father's noncompliance with the requirement that he protect the children from their "abuser" was the Department's "greatest concern."

C. Finding Regarding Reasonable Reunification Services

A juvenile court must find by "clear and convincing evidence that reasonable services have been provided or offered to the parents" before it may set a hearing pursuant to section 366.26. (§ 366.21, subd. (g)(2).) Conversely, at a six-month status review hearing involving a "child was under the age of three years on the date of initial removal," the court must continue the matter and continue providing services "[i]f [it] finds . . . that reasonable services have not been provided." (§ 366.21, subd. (e).) Here, the juvenile court's order of July 23, 2004, included a finding "by clear and convincing evidence that reasonable services [were] provided or offered to the parents to aid them in overcoming the problems which led to the initial removal of the child."

Father claims this finding was error as to him.

In reviewing the finding, we examine the record in the light most favorable to the court's ruling to determine whether substantial evidence would permit a reasonable trier to find, by the clear and convincing evidence standard, that the Department made a good faith effort to provide reasonable services. (See *In re Monica C.* (1995) 31 Cal.App.4th 296, 306; *In re Andrea G.* (1990) 221 Cal.App.3d 547, 552; see also *In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75; *In re Julie M.* (1999) 69 Cal.App.4th 41, 46.) Such a good faith effort does not require the Department to provide the best services possible in an ideal world, but services that are reasonable under all the circumstances. (*In re Julie M.*, at p. 48.) An agency's good faith effort to provide services should include identification of the problems leading to the loss of custody, an offer of reunification services designed to remedy those problems, reasonable contact with the parents during the course of the reunification plan, and reasonable efforts to assist the parents in any area in which their compliance has proved to be difficult. (*Armando L. v. Superior Court* (1995) 36 Cal.App.4th 549, 554–555.)

The Department completed an initial identification of Father's service objectives in August 2003, only two days after Christopher was first detained, and at that time offered Father general counseling, weekly visitation with Christopher, and monthly contact with the social worker. In its plan prepared for the October 2003 dispositional

hearing, which the court ordered the parties to adopt, the Department identified Father's objectives in more detail. These included obtaining the resources necessary to meet the children's needs, maintaining a relationship with Christopher, and demonstrating his ability to protect Monique and Johnny, and, by extension, Christopher, if he were to be returned to Father's home, from the emotional harm and physical danger posed by Mother's substance abuse. In this plan the Department again requested his participation in counseling to assist him in meeting his objectives, and additionally offered and requested his participation in parenting classes. At this time the Department continued to provide Father with visitation services and contact with the social worker, and offered to assist him in scheduling any medical or other appointments necessary to meet his children's needs.

In November and December 2003, the social worker began efforts to assist Christopher's return to Father's home by providing referrals for child care providers who could care for Christopher while Father was at work. She testified she also informed Father that, if he pursued such an arrangement, they "could look into" the possibility of obtaining funding that was available to defray or reduce child care costs.

In March 2004, the Department updated its plan in preparation for the "dispositional" hearing on its section 387 petition. By this time, almost seven months after Christopher's initial removal, the Department emphasized the need for Father to "ensure that [he could] protect the children" by taking a more active role in assisting Mother's treatment for alcohol use. To do this it requested that Father attend Al-Anon meetings and meet with two counselors assigned to assist the family with substance abuse and parenting issues. The Department also requested that Father undergo a psychiatric evaluation and follow any recommendations. The social worker testified this evaluation was to "explore" factors affecting "the choices [Father was] making," and to address "issues . . . we weren't able to get to." The updated plan continued visitation and regular contact with the social worker, continued to offer assistance in meeting the children's health care needs, and noted Father had consistently declined previous offers of individual counseling.

A further updated plan, prepared in May 2004, again emphasized that Father must assume a more active role in protecting his children by "requir[ing] [Mother] to enter a residential inpatient treatment program," by "going to weekly Alanon [*sic*] meetings to address his chronic co-dependent behaviors," by "begin[ning] individual counseling to assist him with his co-dependent behaviors," and by "obtain[ing] a restraining order against [Mother] ordering her to stay away from the home and the children." At this time the Department also referred Father to a "budget-managing counselor" to address his "expressed concern regarding his financial situation." It continued its visitation services, regular social worker contacts and additionally offered Father assistance with tutoring services for Monique and Johnny.

Father, in essence, argues the foregoing "services . . . were not reasonable" because they were not adequately tailored to his needs. He asserts, for example, "there [was] no reason to believe [he] needed services" in the form of counseling, Al-Anon meetings, or a psychological evaluation. In his view, reasonable services would have instead consisted of efforts by the Department, on its own initiative, to obtain a restraining order under section 213.5 to keep Mother away from Father's home. Reasonable services would also have included the Department's "compliance with . . . Family [Code] section 17552 to alleviate the financial strain of garnishment on [Father]" and action on its part to "insur[e] . . . childcare [was] in place" once Christopher was returned to Father's custody.

In our view, the foregoing evidence shows the Department made reasonable efforts to identify the causes that led to Father's loss of custody in Christopher's case, and also to identify and assist Father with the steps he needed to take to remedy these causes and secure Christopher's return. The social worker repeatedly expressed her professional opinion that the counseling, the Al-Anon meetings, and the psychological evaluation that Father contends were unnecessary were, on the contrary, reasonable and appropriate to address his role in the causes that led to Christopher's removal. In addition, the social worker maintained reasonable contact with Father, including weekend visits to his home. In a number of instances she made reasonable efforts to assist Father in areas in which his

compliance had proved difficult. As noted above, these efforts included a referral for budget management to assist Father in finding solutions to the financial concerns he had expressed, as well as efforts to assist Father in obtaining the child care necessary for Christopher's return.

Father's assertions concerning section 213.5 and Family Code section 17552 do not persuade us otherwise. The social worker testified that the Department's "real emphasis" was not simply to remove Mother from the home, but had always been an effort to "get[] . . . both [parents] into treatment and work[] towards . . . getting . . . Christopher returned" to them. It was for this reason the Department did not suggest a restraining order. (See § 213.5.) In other words, the Department did not initially seek a restraining order against Mother, to assist in *Father's* efforts to reunify with Christopher, because to do so would have interfered with its good faith attempt to further *Mother's* reunification efforts. When the Department finally requested that Father obtain a restraining order, in May 2004, this was not to serve Father's reunification efforts but to protect against the increasing harm to the "emotional well being" of Monique and Johnny. Similarly, the social worker testified that, once Mother mentioned to her that the Department's child support services branch was seeking reimbursement from Father for the cost of Christopher's foster care, she referred Father to the Department worker who handled requests to reduce support payments that interfered with a parent's reunification plan. Family Code section 17552 does not appear to require more.[10]

In sum, it is clear to us the Department, from the outset of this proceeding, made a good faith effort to provide Father with reunification services that were reasonable under all the circumstances. (*In re Julie M., supra,* 69 Cal.App.4th at p. 48.) We conclude there is substantial evidence by which a reasonable trier of fact could make this finding

[10] Family Code section 17552 simply requires the state Department of Social Services to develop regulatory procedures by which local child welfare agencies may determine whether it is in the best interests of a child in foster care to refer his or her case to the local child support agency. Such a referral may not be in the child's best interests, for example, if enforcing support payment from a parent would compromise that parent's ability to satisfy reunification requirements. (See Fam. Code, § 17552, subd. (a).)

by clear and convincing evidence. (See *In re Monica C., supra,* 31 Cal.App.4th at p. 306.)

D. Failure to Admonish Father Regarding Six-Month Limit on Reunification

When, as here, a dependent child is under three years of age on the date of his or her initial removal from a parent's physical custody, a parent is generally entitled only to six months of court-ordered services from the date the child enters foster care. (§ 361.5, subd. (a)(2).) The juvenile court in such a case is accordingly required to "inform the parent . . . that [his or her] failure . . . to participate regularly in any court-ordered treatment programs or to cooperate or avail himself or herself of services provided as part of the child welfare services case plan may result in a termination of efforts to reunify the family after six months." (§ 361.5, subd. (a)(3).)

At the combined hearing on July 23, 2004, Father's counsel objected to the Department's recommendation that Father's reunification services be terminated on the ground that the minute order of the October 2003 dispositional hearing failed to reflect that the court had given Father the above-described advisement. Counsel argued the court's failure to give the advisement at that time "mandate[d]" that it provide Father with an additional six months of reunification services. Father's final contention essentially reiterates this argument.

We question, in the first instance, whether Father has properly presented this issue for a determination on the merits. There is a presumption that the court regularly performed its duty. (See Evid. Code, § 664.) While the minute order of October 21, 2003, does not reflect that court gave the required advisement, this in itself is not sufficient to establish affirmatively its failure to do so. Although it is undoubtedly good practice, the juvenile court is not expressly required to include such a finding in its minutes. (See § 361.5, subd. (a)(3); rule 1456(f)(1); cf. rule 1412(k) [hearing rights must be noted in minutes].) Father has not otherwise made the affirmative showing necessary to rebut the presumption. For example, although Father's counsel appeared at the October 21, 2003 dispositional hearing and also signed the verification of Father's petition for extraordinary writ, the latter petition does not include any averment that the

juvenile court actually failed to give the advisement—it merely states that the minute order does not reflect that fact. Similarly, the reporter's transcript generally prevails as the official record when such an issue is presented.[11] (See *Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 569–570.) Father nonetheless failed to request augmentation to include a transcript of the October 2003 dispositional hearing, which is not one of the items routinely included in the record prepared for review of his petition. (Rule 39.1B(g).) It was his responsibility to ensure such augmentation to provide an adequate record. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 583; see rule 39.1B(n).)

Nevertheless, we assume, without deciding, that the juvenile court erred in failing to give Father the advisement required by section 361.5, subdivision (a)(3), at the October 2003 dispositional hearing. The failure to give this statutorily required advisement does not implicate Father's constitutional due process rights. It is therefore not reversible per se, but is subject to the harmless error rule. (See *Arlena M. v. Superior Court, supra,* 121 Cal.App.4th at p. 571.) We find no evidence in the record, including Father's testimony, showing that *if* Father had been advised of the possible consequences of his inaction, he would have promptly and consistently participated in his plan. To the contrary, the evidence shows that Father's failure to participate actively in his plan was consistent with behaviors dating back as far as May 1990. We conclude any error was harmless under the circumstances. (*Id.* at p. 573.)

DISPOSITION

The petition for extraordinary writ is denied on the merits. (See Cal. Const., art. VI, § 14; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894; *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024.)

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[11] Because we assume such error, it is unnecessary to grant the Department's request for augmentation of the record to include the transcript of the October 21, 2003 hearing, which it filed with this court on September 13, 2004, as a "motion for the consideration of additional evidence pursuant to . . . Code of Civil Procedure section 909." Accordingly we deny that motion.

The section 366.26 hearing is set for October 26, 2004. Therefore, our decision is final in this court immediately. (Rule 24(b)(3).)

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Margulies, J.

We concur:

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Marchiano, P.J.

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Stein, J.